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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

NO. 409

TENNESSEE COAL, IRON & RAILROAD COMPANY, *Petitioner,*

vs.

MUSCODA LOCAL NO. 123, ETC., Et al., *Respondents.*

SLOSS-SHEFFIELD STEEL & IRON COMPANY, *Petitioner,*

vs.

SLOSS RED ORE LOCAL NO. 109, Etc., Et al., *Respondents.*

REPUBLIC STEEL CORPORATION, *Petitioner,*

vs.

RAIMUND LOCAL NO. 121, Etc., Et al., *Respondents.*

REPLY OF RESPONDENTS, MUSCODA LOCAL No. 123, ET AL., TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BIRMINGHAM PRINTING COMPANY, BIRMINGHAM, ALA.

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STATEMENT OF THE CASE

Each of the three companies brought a suit against its underground ore mining employees and various Unions of such employees. By agreement the cases were tried together. The plaintiffs asked for declaratory judgments and for injunctions to prevent the employees from bringing suit for overtime compensation claimed to be due them under the Fair Labor Standards Act of 1938.

The plaintiffs invited the Wage and Hour Administrator under the Fair Labor Standards Act of 1938 to intervene in the suits. The invitation was accepted.

The District Court rendered declaratory judgments in favor of the employees. The companies then appealed to the United States Circuit Court of Appeals for the Fifth Circuit. That Court affirmed the judgment of the lower court with a slight modification. The companies applied for a rehearing. The Circuit Court of Appeals denied the petition for rehearing, rendering an additional opinion.

QUESTION

The precise statement of the question involved is found in the Order on Pre-Trial Hearing, which is found on page 278 of the transcript and which reads in part as follows:

> "2. It was agreed by all of the parties that the following are all of the issues in controversy in this cause:
>
> "a. What constitutes the working time which makes up the workweek of the underground ore mining employees of the plaintiff within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

"(1) In reference to "a" above, the plaintiff contends that such workweek does not include that portion of the time spent by the underground ore mining employees in being transported or walking to and from their usual working places.

"(2) In reference to "a", above, the defendants contend that the workweek covers all time from portal to portal as announced in the opinion and report of the Wage & Hour Administrator under the Fair Labor Standards Act on March 23, 1941, also includes aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out.

"b. If the Court determines issue "a" adversely to the plaintiff, the Court will further determine whether or not the defendants and other underground iron ore employees who are now or who hereafter may become parties are entitled to recover against the plaintiff, and if so, how much.

"On the consideration of "b", above, the parties shall have the right and opportunity of presenting for the Court's consideration all of their respective claims, rights and defenses."

The District Court upheld the contention of the defendants as stated in paragraph numbered 2.

The Circuit Court of Appeals held that the workweek did not include the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out. The exact holding of the Circuit Court of Appeals is found in this language of the original opinion:

"Applying Section 7 of the Act to the facts of this case, we hold that the time spent by underground

mining employees of appellants, from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties, constituted working time comprising the workweek." (135 Fed. 2nd., page 323).

The question whether the employees were at work from portal to portal was and is a question of fact. The District Court so held in this language:

> "In the last analysis, therefore, plaintiffs must stand or fall on the question whether the time in issue was employment and work, as a matter of simple fact." (40 F. Supp., page 8).

In its opinion on rehearing the Circuit Court of Appeals agreed with the District Court. The opinion contains this language:

> "What constituted the work-week of these employees and how many hours they were suffered or permitted to work are questions of fact." (R. page 5001).

POINTS OF LAW

1.

"The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (28 U.S.C.A. Sec. 773):

Stanley v. Supervisors of Albany, 121 U.S. 535 at 547;

Hathaway v. Cambridge National Bank, 134 U.S. 494 at 498;

Dooley v. Pease, 180 U.S. 126 at 131;

Brooks v. Willcuts, 78 F. 2nd 270;

Gideon-Anderson L. Co. v. St. Louis Southwestern Ry. Co., 88 F. 2nd 232;

Union Bleachery v. United States, 79 F. 2nd 549 at 550;

North American Acc. Ins. Co. v. Anderson, 100 F. 2nd 452 at 455-6;

Funk v. Aetna Life Ins. Co. of Hartford, Conn., 9 Cir., 95 F. 2nd 38.

II.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Rule 52 of the Rules of Civil Procedure, U.S. 308, page 65).

ARGUMENT

The petition and supporting brief deal so extensively with a union not a party to this suit that it seems advisable to identify the parties. The employees involved are ore miners who are for the most part members of the CIO. A few hundred employees of one petitioner only are members of the AFL. These are not suits between the petitioners and the United Mine Workers of America.

After enumerating nine alleged reasons for granting the writ, the petitioners start over again and give two additional reasons not apparent on the record. The first reason (page 10 of Petition) involves the assertion that United

Mine Workers of America claim that it was the intention of the Congress to include as a part of the "work week" all of the underground time of coal miners. If counsel for petitioners hope by indirection to suggest that a decision favorable to them is a matter of national importance because it will settle the unsettled coal situation, counsel are mistaken. It is a matter of common knowledge that the contracts between the coal operators and the mine workers expired on March 31, 1943, and that portal to portal pay subsequent to that expiration date has been under negotiation.

The solution of the coal problem does not pivot upon a construction of the Fair Labor Standards Act. It turns upon the execution of a contract between the operators and the mine workers. Hence, we respectfully submit that the effort to obtain a review of the ore miners case by briefing and arguing the rights of coal miners, whose cases have not been tried and which may or may not be tried, should meet with the same failure in this Court that it has suffered in the District Court and in the Circuit Court of Appeals.

That effort has been constant and persistent. The courts below, however, tried the cases of the parties litigant who were then before the courts. It is not in accordance with the essential nature of the judicial process to review a decision between plaintiff "A" and defendant "B" in order to predetermine a case that may or may not come up between plaintiff "X" and defendant "Y". Such a course of action is legislative rather than judicial.

One basic fact which should be borne in mind is that the defendant employees are now being paid from portal to portal. The verified petitions filed during April 1941 solemnly assured the court of the ruin which would follow

if the ore miners got pay from portal to portal. The trial did not start until July 8, 1941, but the petitioners began to pay on a portal to portal basis on May 1, 1941. They are still paying ore miners on that basis.

Since the Declaratory Judgments Act deals with cases of actual controversy, it is easy to see why the lower courts did not write an abstract essay for the period subsequent to May 1, 1941. It is correspondingly difficult to see how the petitioners can sincerely complain about this attitude of the courts.

TRIAL BY JUDGE WITHOUT A JURY

Congress has enacted that in a trial without a jury, the findings of the judge shall have the same weight as the verdict of a jury. In *Stanley v. Supervisors of Albany*, 121 U.S. 535 at 547, Mr. Justice Field uses this language:

> "Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different."

In the case of *Hathaway v. Cambridge National Bank*, 134 U.S. 494 at 498, we find the following statement:

> "The first three assignments of error allege errors merely in the findings of fact by the court. Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be

made. The *Francis Wright*, 105 U.S. 381, 387; *McClure v. United States*, 116 U.S. 145, 152; *Union Pacific Railway v. United States*, 116, U.S. 154, 157; *Merchants' Ins. Co. v. Allen*, 120 U.S. 67, 71."

Then in the case of *Dooley v. Pease*, 180 U.S. 126 at 131, the same rule is pronounced:

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Supervisors*, 121 U.S. 547."

See, to the same effect, *Brooks v. Willcuts*, 78 F. 2nd 270; *Gideon-Anderson L. Co. v. St. Louis Southwestern Ry. Co.*, 88 F. 2nd 232.

The Circuit Court of Appeals for the 4th Circuit, in *Union Bleachery v. United States*, 79 F. 2nd 549 at 550, expresses the rule as follows:

> "It is well settled, of course, that the findings of the trial judge in a case such as this have the effect of the verdict of a jury, and that, even where properly excepted to, they will not be disturbed if supported by any substantial evidence."

The Circuit Court of Appeals for the 10th Circuit, in the case of *North American Acc. Ins. Co. v. Anderson*, 100 F. 2nd 452 at 455-6, gives recognition to the ancient doctrine in the following language:

> "In the instant case, a jury in effect having been waived, the trial judge was the trier of the facts, charged with the duty of making deductions from the undisputed facts, and this court may not substitute its own conclusions as to the facts for those of the court

below, when same are supported by substantial evidence as it is under this record."

* * * * * * * * *

"In Funk v. Aetna Life Ins. Co. of Hartford, Conn., 9 Cir., 95 F. 2nd 38, the defense was "change of occupation". A jury was waived and the trial court found for defendant, and on appeal it was held that the court was without jurisdiction to consider the sufficiency of the evidence to support the findings."

When we consider the fact that the District Judge sees and hears the witnesses, gets the expression on their faces and the tone of their voices, and sees the shifting interplay of forces between counsel and frequently hears many side remarks and statements of counsel that never find their way into the printed record, it is not strange that his judgment should be given great weight.

There are many other cases cited in footnotes 33 and 34 to Title 28 U.S.C.A. Section 875 which uphold this legal principle.

The Fair Labor Standards Act of 1938 requires that men employed in excess of a specified number of hours in a work week be paid for such excess at one and one-half times their regular rate of pay. The word employ is defined by the Act to include "to suffer or permit to work." The only question in the case, as we see it, is whether the underground ore miners were at work while going from the portal to the face and back again. That is a simple question of fact.

We have never understood that this Court was very much concerned about questions of fact in civil cases. Neither have we understood that the amount of money in-

volved determined whether a case was one of national importance.

We respectfully submit that under the decisions of this Court, the rules of civil procedure and the Acts of Congress, the petitioners are not entitled to a writ of certiorari.

Respectfully submitted,

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I hereby certify that I have mailed a copy of the foregoing reply to Mr. Borden Burr, counsel of record for the Tennessee Coal, Iron & Railroad Company, and another copy to him as counsel of record for the Republic Steel Corporation, and that I have mailed a copy to Mr. Ernest All, counsel of record for Sloss-Sheffield Steel & Iron Company, this 21st day of October, 1943.

Crampton Harris